TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 98.

GOTLIEB HART AND GEORGE STAHL, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES OF AMERICA.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

FILED AUGUST 25, 1875.

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1 Supreme Court of the United States.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the circuit court of the United States for the sixth circuit and northern district of Ohio, greeting:

Because in the record and proceedings, and also in the rendition of a judgment in a plea which is in the said circuit court before you, between the United States of America, plaintiff, and Theodore Hosmer, Gotlieb Hart, and George Stahl, defendants, a manifest error hath happened, to the great damage of the said Gotleib Hart and George Stahl, defendants, as by their complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington, on the first Monday in the month of October next, in the said Supreme Court then and there to be held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the said Supreme Court of the United States, this 4th day of January, in the year of our Lord on' thousand eight hundred and seventy-five, and of the Independence of the United States of America the 99th.

[SEAL.] Attest: EARL BILL,
Clerk Circuit Court N. D. of Ohio.

2 UNITED STATES OF AMERICA,
Northern District of Ohio, ss:

The execution of the within writ of error will appear by the transcript of the within-mentioned judgment and proceedings, duly authenticated, with the citation issued to the said defendant in error, the assignment of errors by said plaintiffs in error, and prayer for reversal, also a copy of the bond given by the said plaintiffs in error on the signing of said citation; all which are hereto annexed and returned herewith.

EARL BILL,
Clerk Circuit Court of the U. S. for said District.

Fees:

Filing precipe & issuing writ of error	$1 10
Copy of same placed on file & filing, 5 f	60
Entering return ther'on	15
Drawing bond, 4 fol	60
Filing same	10
Copy of same annexed to writ & c't't' & seal	75
Issuing citation	1 00
Making transcript, 86 fol	8 60
Certifying same & seal	35
	$13 25

(Indorsed:) Gotlieb Hart and George Stahl vs. The United States. Writ of error. Homer Goodwin, att'y for pl'ffs in error.

3 THE UNITED STATES OF AMERICA:

Supreme Court of the United States.

To the United States of America, greeting:

Whereas Gotlieb Hart and George Stahl have obtained the allowance of our writ of error to the circuit court of the United States within & for the northern district of Ohio, directed to remove into the said Supreme Court, to be holden at the city of Washington on the first Monday of October next, the record of a certain plaint, process, proceedings, and judgment in an action of debt, wherein you, the said United States, in that action lately recovered against the said Gotleib Hart and George Stahl, and one Theodore Hosmer, the sum of three thousand and forty-eight dollars and forty cents, debt, and costs, as by the said record in the said circuit court now remaining appears, in which said record and proceedings, and also in the rendition of the judgment thereupon, manifest error hath intervened, as by the said Gotleib Hart and George Stahl we are informed, and our said writ of error granted, issued, and allowed as aforesaid, for the purpose of correcting the errors aforesaid alledged, if any there be; you are, therefore, hereby commanded and cited to be and appear before the judges of the said Supreme Court, at the city of Washington, at the next term of said court, to be holden on the first Monday in the month of October next, to have the errors aforesaid corrected, and the judgment of our said Supreme Court thereupon.

Witness the honorable M. R. Waite, Chief-Justice of the United States of America, this 7th day of January, in the year of our Lord one thousand eight hundred and seventy-five, and of the Independence of the United States of America the 99th.

[SEAL.]

M. WELKER,
Judge of said Circuit Court.

4 Service of the within citation is hereby accepted on the part of the United States.

GEO. WILLEY,
U. S. Attorney.

(Indorsed:) Gotleib Hart and George Stahl vs. The United States. Citation in error. Homer Goodwin, att'y for pl'ffs in error.

5 Supreme Court of the United States.

GEORGE STAHL, GOTLIEB HART, PL'FFS, impleaded with Theodore Hosmer, *vs.* THE UNITED STATES, DEF'T. } In error.

And the said George Stahl and Gottlieb Hart now come and say that in the record and proceedings aforesaid there is manifest error in this, to wit:

1st. The said circuit court erred in sustaining the demurrer of the plaintiff to the first, second, and third defenses set forth in defendant's answer.

2nd. The said circuit court erred in overruling the motion of the defendant below for a new trial.

3d. The said judgment was given in favor of the said United States,

whereas by the laws of the land it ought to have been given in favor of the said George Stahl and Gottlieb Hart.

Wherefore the said George Stahl and Gottlieb Hart pray that
6 a citation and supersedeas may issue, and that the said judgment may be reversed, annulled, and held for nothing, and that they may be restored to all things they have lost by reason thereof.

By H. & L. H. GOODWIN, AND
JOHN M. LEMON, *their Att'ys.*

7 Know all men by these presents that we, Gotleib Hart and George Stahl, as principals, and Constantine Zipfel & David Wolf, as sureties, are held and firmly bound unto the United States of America in the penal sum of six thousand dollars, to the payment whereof well and truly to be made we do by these presents jointly and severally bind ourselves, our heirs, executors, and administrators, sealed with our seals and dated this 4th day of January, A. D. 1875.

The condition of the above obligation is such, that whereas the said Gotleib Hart and George Stahl have sued out of the Supreme Court of the United States a writ of error upon a certain judgment rendered in the circuit court of the United States within and for the northern district of Ohio, at the January term thereof, A. D. 1873, in favor of said United States and against Theodore Hosmer and the said Gotleib Hart and George Stahl, for the sum of three thousand and forty-eight dollars and forty cents, debt, and forty-seven dollars and fifty-one cents, costs of suit:

Now, therefore, if the said Gotleib Hart and George Stahl shall prosecute their said writ of error to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation shall be void; otherwise in full force in law.

(Signed) GOTTLIEB HART. [SEAL.]
GEORGE STAHL. [SEAL.]
DAVID WOLF. [SEAL.]
CONSTANTINE ZIPFEL. [SEAL.]

NORTHERN DISTRICT OF OHIO, *ss:*

It is hereby certified that the within is a true copy of an original bond containing on the back thereof the following endorsement of approval, viz: "Filed and approved Jan'y 7, 1875. M. Welker, Judge," which bond now remains on file in the clerk's office of the circuit court of the United States within & for said district.

Witness my official signature and the seal of said court this 7th day of August, A. D. 1875.

[SEAL.] EARL BILL,
Clerk of said Circuit Court.

9 October term, A. D. 1874.

At a stated term of the circuit court of the United States within and for the northern district of Ohio, begun and held at Cleveland, in said district, on the first Tuesday of October, being the sixth day of that month, in the year of our Lord one thousand eight hundred and seventy-four, and of the Independence of the United States of America the ninety-ninth.

Present, the honorable Halmor H. Emmons, circuit judge, and the honorable Martin Welker, district judge.

Among the proceedings then and there had were the following, to wit:

THE UNITED STATES
vs.
THEODORE HOSMER, GOTLIEB HART, & George Stahl. } In debt.

Be it remembered that heretofore, to wit, on the 29th day of May, A. D. 1872, came the plaintiff, by its attorney, and filed in the clerk's office of the court aforesaid its precipe for the issuing of a summons, which is in the words and figures following, to wit:

Precipe.

U. S. circuit court, north. dist. Ohio.

THE U. S.
vs.
THEODORE HOSMER, GOTLIEB HART, & George Stahl. } Debt.

Issue summons to above def'ts, returnable according to law; endorse, "Suit brought on (distiller's) bond made by def'ts on 29th day of May, 1871, in the penal sum of $5,000, conditioned for the faithful compliance of said Hosmer with all the provisions of law in relation to the duties and business of distillers."

Debt, $5,000. Damages, $7,000. Geo. Willey, U. S. att'y, May 29th.

And thereupon there was duly issued herein, by the clerk of said circuit court, a certain writ of summons, which is in the words and figures following, to wit:

Sum's.

THE UNITED STATES OF AMERICA,
Northern District of Ohio, ss:

The President of the United States of America to the marshal of the northern district of Ohio, greeting:

You are hereby commanded to summon Theodore Hosmer, Gotlieb Hart, and George Stahl, if they be found in your district, to be and appear in the circuit court of the United States for the northern district of Ohio aforesaid, at Cleveland, on the 12th day of June, A. D. 1872, to answer unto the United States of a plea of debt, $5,000, damages $7,000; and have you then and there this writ.

Witness the honorable Salmon P. Chase, Chief-Justice of the United States, this 29th day of May, A. D. 1872, and in the 96th year of the Independence of the United States of America.

EARL BILL, *Clerk.*

End's't.

Said summons was endorsed: "Suit brought on (distiller's) bond made by def'ts on 29th day of May, 1871, in the penal sum of $5,000, conditioned for the faithful compliance of said Hosmer with all the provisions of law in relation to the duties and business of distillers. Geo. Willey, U. S. att'y."

And afterward, to wit, on the 31st day of May, A. D. 1872, said summons was duly returned to said clerk's office by said marshal, with his proceedings thereon endorsed, in the words and figures
11 following, to wit:

Return.

NORTHERN DISTRICT OF OHIO, *ss*:

On the 30th day of May, A. D. 1872, I made due service of this writ by delivering a true and certified copy thereof to each of the within named, Theodore Hosmer, Gotlieb Hart, & George Stahl, at Sandusky, Erie County, Ohio.

R. HASTINGS,
U. S. Marshal,
By S. M. SMEAD,
Deputy.

And afterward, to wit, on the 27th day of July, A. D. 1872, came said plaintiff by its attorneys, and filed in the clerk's office of the court aforesaid its petition, which is in the words and figures following, to wit:

Petition.

Circuit court of the United States, northern district of Ohio.

THE UNITED STATES
vs.
THEODORE HOSMER, GOTLIEB HART, AND George Stahl.

The United States, by George Willey, its attorney, complains of the said Theodore Hosmer, Gotlieb Hart, & George Stahl, all citizens of the State of Ohio, and residents of the northern district of Ohio:

First. For that heretofore, to wit, on the 29th day of May, A. D. 1871, at said northern district of Ohio, the said Theodore Hosmer, Gotlieb Hart, and George Stahl made their certain writing obligatory, sealed with their seals and by them signed, and now here to the court shown, and then and there delivered the same to the plaintiff, and thereby acknowledged themselves to be held and firmly bound unto the United States of America in the full and just sum of five thousand dollars, ($5,000,) for the payment whereof well and truly to be made they did thereby bind themselves, their heirs, executors, and administrators, jointly and severally, which said writing obligatory was and is subject to a condition thereunder written, whereby it was and is provided
12 that whereas the said Theodore Hosmer now or intend' on and after the first day of June, A. D. 1871, to be engaged in the business of a distiller, within the 9th collection-district of the State of Ohio, to wit, at 21 & 22 Water street, situate in the city of Sandusky, county of Erie, & State of Ohio aforesaid: Now, therefore, if the said Theodore Hosmer shall, in all respects, faithfully comply with all the provisions of law in relation to the duties and business of distillers, and shall pay all penalties incurred or fines imposed on him for a violation of any of the said provisions, and shall not suffer the tract or lot of land on which the distillery stands, or any part thereof, or any of the distilling apparatus to be encumbered by mortgage, judgment, or other lien during the time in which he shall carry on said business, then this obligation shall be void; otherwise it shall remain in full force.

Second. That from the first day of June, 1871, to the first day of March, 1872, at said district, the said Theodore Hosmer was and continued to be engaged in the business of a distiller, and as such distiller did during said period distil a large amount of spirits, to wit, six thousand (6,000) gallons, on which spirits he as such distiller was bound to pay the tax then and there imposed by law, to wit, the sum of three thousand ($3,000) dollars; yet the said Hosmer, though specially demanded and requested so to do, agreeably to the condition of the said writing obligatory, to wit, on the first day of March, A. D. 1872, wholly neglected and refused, and still neglects and refuses, to pay said taxes or any part thereof, as he was bound and is bound to do by the provisions of the law in such case made and provided, and the tenor
13 and effect of said writing obligatory.

Third. The plaintiff therefore asks judgment against the said defendants for the said sum of three thousand dollars, ($3,000,) with interest thereon from the first day of March, A. D. 1872.

GEO. WILLEY,
U. S. Attorney, North. District Ohio.

And afterward, to wit, on the 12th day of November, A. D. 1872, came the defendants, Hart and Stahl, by their attorneys, and filed herein their answer, which is in the words and figures following, to wit:

Answer.

THE UNITED STATES, PL'FF,
vs.
THEODORE HOSMER, GOTLIEB HART, & George Stahl, def'ts.

In the circuit court of the United States, northern district of Ohio.

1ST DEFENCE. The defendants, Gotlieb Hart & George Stahl, now come, and separately from said Hosmer, answering the petition of the plaintiff, they deny that said bond in the petition described was ever delivered to the said plaintiff. They deny that the assessor of said 9th collection-district had any authority of law to approve said bond or writing obligatory, and deny that the collector, or any other officer of the plaintiff, had any authority to receive the same; and they deny that there is anything due from them upon said obligation; and all allegations of the petition to that effect are denied.

2D DEFENCE. And for a second defence these defendants say that the plaintiff its action aforesaid ought not to have against them, because they say that these defendants, at the time they signed the said bond, were the sureties only of said Hosmer, and signed it merely for his accommodation, and without other consideration, as the officers of
14 the plaintiff who conducted the transaction well knew; and that when they signed said bond they supposed, and by the officers of said plaintiff were given to understand, that the said instrument was one of those distiller's bonds which by the act of Congress in such case made and provided was authorized to be taken and approved; but, on the contrary, he says that at the time the bond set out in the petition was executed, the defendant Hosmer was the owner of the lots and premises described in the petition on which the said distillery and distillery apparatus was situated, and being parts of lots numbers twenty-one and twenty-two on Water street, in the city of Sandusky, Erie County, Ohio, in fee.

And they say that said Hosmer had prior to that time, and subsequent to July 20th, 1868, to wit, on the 23d day of May, 1871, for a valuable consideration, executed and delivered to one John Dempsey a mortgage upon said lots and premises on which said distillery and distillery apparatus stood, to secure the payment to said Dempsey of a bona-fide debt of said Hosmer in the sum of two thousand six hundred and eighty-one & $\frac{53}{100}$ dollars, and which mortgage had been duly recorded in the recorder's office of said Erie County on the 25th day of May, A. D. 1871, but the existence of said mortgage was entirely unknown to these defendants.

And these defendants say that the officers of said plaintiff having the matter in charge did not, nor did either of them, require of said Hosmer, nor did he at any time file with the assessor, the written consent of said Dempsey, the mortgagee, duly acknowledged, that the premises might be used for the purpose of distilling spirits subject to the provis-
15 ions of law, and stipulating that the lien of the United States for taxes and penalty should have priority to said mortgage, and in case of forfeiture of said premises or any part thereof the title of the same should vest in the United States discharged of said mortgage; nor did said Hosmer execute, nor did they require of him that he execute, a bond to indemnify against said mortgage, as is provided by the act of Congress (passed April 10, 1869) entitled "An act to amend an act entitled 'An act imposing taxes on distilled spirits and tobacco, and other purposes,' approved July 20th, 1868." But the said assessor approved said bond without such written consent filed or bond taken.

And these defendants further say that by reason of the non-payment by said Hosmer of the taxes upon the spirits distilled by him, and which were chargeable and a lien upon said premises, under the provisions of the law, on or about the 29th day of March, A. D. 1872, Clark Center, the collector of internal revenue for the 9th district of Ohio, issued to H. F. Spencer, his deputy collector, a warrant of distraint, by virtue of which said deputy, on the 29th day of March, A. D. 1872, levied upon 26 feet front and rear off the east side of Water street, lot number twenty-two, (22,) and (40) forty feet in width off the west side of Water street, lot number twenty-one, (21,) (with and subject to the right of passage-way off and adjoining the east side thereof,) in the city of Sandusky, Erie County, Ohio, together with all the fixtures and appurtenances thereto belonging, and the said distillery and distillery apparatus; and the said deputy collector advertised the same for sale, and sold the same at 2 o'clock p. m. on the 30th day of April, 1872, for sixty-one hundred (6,100) dollars, to said John Dempsey, the
16 mortgagee; and the amount due upon his mortgage at that time, and which was paid out of the purchase-money, was about twenty-seven hundred thirty-three & $\frac{31}{100}$ dollars, and had it not been for the existence of said mortgage, the amount due for the taxes and penalty from said Hosmer to the plaintiff would have been fully paid, and also all costs of seizure and sale, out of the proceeds of said property. These defendants therefore pray judgment whether the plaintiff its action aforesaid ought to have or maintain against them.

THIRD DEFENCE. And for a further defence these defendants say that the plaintiff its action aforesaid ought not to have or maintain against them, because they say that all the taxes which the plaintiff is entitled to charge against said Hosmer, and which said Hosmer was bound to pay, (these defendants denying that said Hosmer distilled 6,000 gallons of spirits on which taxes were unpaid, and denying that the sum of $3,000 in taxes was lawfully imposed thereon,) were assessed on spirits

Second. That from the first day of June, 1871, to the first day of March, 1872, at said district, the said Theodore Hosmer was and continued to be engaged in the business of a distiller, and as such distiller did during said period distil a large amount of spirits, to wit, six thousand (6,000) gallons, on which spirits he as such distiller was bound to pay the tax then and there imposed by law, to wit, the sum of three thousand ($3,000) dollars; yet the said Hosmer, though specially demanded and requested so to do, agreeably to the condition of the said writing obligatory, to wit, on the first day of March, A. D. 1872, wholly neglected and refused, and still neglects and refuses, to pay said taxes or any part thereof, as he was bound and is bound to do by the provisions of the law in such case made and provided, and the tenor
13 and effect of said writing obligatory.

Third. The plaintiff therefore asks judgment against the said defendants for the said sum of three thousand dollars, ($3,000,) with interest thereon from the first day of March, A. D. 1872.

GEO. WILLEY,
U. S. Attorney, North. District Ohio.

And afterward, to wit, on the 12th day of November, A. D. 1872, came the defendants, Hart and Stahl, by their attorneys, and filed herein their answer, which is in the words and figures following, to wit:

Answer.

THE UNITED STATES, PL'FF,
vs.
THEODORE HOSMER, GOTLIEB HART, & George Stahl, def'ts.

In the circuit court of the United States, northern district of Ohio.

1ST DEFENCE. The defendants, Gotlieb Hart & George Stahl, now come, and separately from said Hosmer, answering the petition of the plaintiff, they deny that said bond in the petition described was ever delivered to the said plaintiff. They deny that the assessor of said 9th collection-district had any authority of law to approve said bond or writing obligatory, and deny that the collector, or any other officer of the plaintiff, had any authority to receive the same; and they deny that there is anything due from them upon said obligation; and all allegations of the petition to that effect are denied.

2D DEFENCE. And for a second defence these defendants say that the plaintiff its action aforesaid ought not to have against them, because they say that these defendants, at the time they signed the said bond, were the sureties only of said Hosmer, and signed it merely for his accommodation, and without other consideration, as the officers of
14 the plaintiff who conducted the transaction well knew; and that when they signed said bond they supposed, and by the officers of said plaintiff were given to understand, that the said instrument was one of those distiller's bonds which by the act of Congress in such case made and provided was authorized to be taken and approved; but, on the contrary, he says that at the time the bond set out in the petition was executed, the defendant Hosmer was the owner of the lots and premises described in the petition on which the said distillery and distillery apparatus was situated, and being parts of lots numbers twenty-one and twenty-two on Water street, in the city of Sandusky, Erie County, Ohio, in fee.

And they say that said Hosmer had prior to that time, and subsequent to July 20th, 1868, to wit, on the 23d day of May, 1871, for a valuable consideration, executed and delivered to one John Dempsey a mortgage upon said lots and premises on which said distillery and distillery apparatus stood, to secure the payment to said Dempsey of a bona-fide debt of said Hosmer in the sum of two thousand six hundred and eighty-one & $\frac{53}{100}$ dollars, and which mortgage had been duly recorded in the recorder's office of said Erie County on the 25th day of May, A. D. 1871, but the existence of said mortgage was entirely unknown to these defendants.

And these defendants say that the officers of said plaintiff having the matter in charge did not, nor did either of them, require of said Hosmer, nor did he at any time file with the assessor, the written consent of said Dempsey, the mortgagee, duly acknowledged, that the premises might be used for the purpose of distilling spirits subject to the provis-
15 ions of law, and stipulating that the lien of the United States for taxes and penalty should have priority to said mortgage, and in case of forfeiture of said premises or any part thereof the title of the same should vest in the United States discharged of said mortgage; nor did said Hosmer execute, nor did they require of him that he execute, a bond to indemnify against said mortgage, as is provided by the act of Congress (passed April 10, 1869) entitled "An act to amend an act entitled 'An act imposing taxes on distilled spirits and tobacco, and other purposes,' approved July 20th, 1868." But the said assessor approved said bond without such written consent filed or bond taken.

And these defendants further say that by reason of the non-payment by said Hosmer of the taxes upon the spirits distilled by him, and which were chargeable and a lien upon said premises, under the provisions of the law, on or about the 29th day of March, A. D. 1872, Clark Center, the collector of internal revenue for the 9th district of Ohio, issued to H. F. Spencer, his deputy collector, a warrant of distraint, by virtue of which said deputy, on the 29th day of March, A. D. 1872, levied upon 26 feet front and rear off the east side of Water street, lot number twenty-two, (22,) and (40) forty feet in width off the west side of Water street, lot number twenty-one, (21,) (with and subject to the right of passage-way off and adjoining the east side thereof,) in the city of Sandusky, Erie County, Ohio, together with all the fixtures and appurtenances thereto belonging, and the said distillery and distillery apparatus; and the said deputy collector advertised the same for sale, and sold the same at 2 o'clock p. m. on the 30th day of April, 1872, for sixty-one hundred (6,100) dollars, to said John Dempsey, the
16 mortgagee; and the amount due upon his mortgage at that time, and which was paid out of the purchase-money, was about twenty-seven hundred thirty-three & $\frac{31}{100}$ dollars, and had it not been for the existence of said mortgage, the amount due for the taxes and penalty from said Hosmer to the plaintiff would have been fully paid, and also all costs of seizure and sale, out of the proceeds of said property. These defendants therefore pray judgment whether the plaintiff its action aforesaid ought to have or maintain against them.

THIRD DEFENCE. And for a further defence these defendants say that the plaintiff its action aforesaid ought not to have or maintain against them, because they say that all the taxes which the plaintiff is entitled to charge against said Hosmer, and which said Hosmer was bound to pay, (these defendants denying that said Hosmer distilled 6,000 gallons of spirits on which taxes were unpaid, and denying that the sum of $3,000 in taxes was lawfully imposed thereon,) were assessed on spirits

distilled by said Hosmer at his said distillery, and that said taxes were a first and paramount lien upon said spirits, and the said spirits were deposited in the bonded warehouse of the plaintiff, and under the sole control of the plaintiff's officers; yet the collector of internal revenue for said district permitted said Hosmer to remove and dispose of and convert to his own use a large amount of said spirits, to wit, five thousand gallons, from the bonded warehouse of the said plaintiff, and more than enough to pay all the taxes chargeable thereon, and more than enough to pay any just claim of the plaintiff against said Hosmer for taxes; and this they did without first requiring payment of the taxes thereon,
17 and which are claimed in the petition, and without the knowledge or assent of these defendants.

Wherefore these defendants pray judgment if the plaintiff its action aforesaid ought to have or maintain against them.

TAYLOR & LEMMON & H. GOODWIN,
Def'ts' Att'ys.

THE STATE OF OHIO, *Erie County, ss:*

George Stahl, having been duly sworn by me, says that he believes the facts contained in the foregoing answer to be true.

GEO. STAHL.

Sworn to by George Stahl before me and signed in my presence this 12th day of November, A. D. 1872.

CHAS. H. BILL,
Dep. U. S. Clerk.

Demurrer.

And afterward, to wit, on the 16th day of November, 1872, there was duly filed herein, by said plaintiff, its demurrer to the foregoing answer, which is in the words and figures following, to wit:

THE UNITED STATES
vs.
GOTLIEB HART & GEORGE STAHL.

U. S. circuit court, north. dist. Ohio.

And the said plaintiff, by Geo. Willey, its attorney, now comes and demurs to the second and third pleas of the answer of said defendants, because the facts stated in said second and third counts of said answer do not constitute in law a defence to the action of said plaintiff, and therefor prays judgment as in his said petition.

GEO. WILLEY,
U. S. Att'y, N. D. O.

And afterwards, to wit, on the 18th day of November, A. D. 1872, came the plaintiff, by its attorney, and filed in the clerk's office of said court its motion to strike out, &c., which is in the words and figures following, to wit:

Motion to strike out, &c.

THE UNITED STATES
vs.
THEODORE HOSMER, GOTLIEB HART, & George Stahl.

U. S. circuit court N. D. O. Motion.

And now comes the United States, by George Willey, its attorney, and from the first count of defendants' answer, moves the court to strike
18 out for irrelevancy and redundancy, the following words: "They

deny that the assessor of said 9th collection-district of Ohio had any authority of law to approve said bond or writing obligatory, and deny that the collector, or any other officer of the plaintiff, had any authority to receive the same."

GEO. WILLEY,
U. S. Att'y.

Hearing on mo. & demur. & taken under advisement.

And afterward, to wit, at the October term of the said court, to wit, on the 19th day of November, A. D. 1872, came the parties, by their attorneys, and this cause came on to be heard upon the demurrer of the plaintiff, the 2d and 3d counts of the answer of the defendants, Gotlieb Hart and George Stahl, and the motion of said plaintiff to strike out from the 1st count of said answer irrelevant matter, and was argued by counsel. And the arguments of counsel being concluded, this cause was thereupon taken under advisement by the court.

And afterward, to wit, on the 1st day of February, A. D. 1873, came said defendants, Hart & Stahl, and filed herein their motion for a rehearing and new trial of this cause, which is in the words and figures following, to wit:

Motion for rehearing, &c.

THE UNITED STATES, PL'FF,
vs.
THEODORE HOSMER, GOTLIEB HART, & George Stahl, def'ts.

In the circuit court of the United States for the northern district of Ohio.

Motion for rehearing and new trial.

And now come the defendants, Gotlieb Hart and George Stahl, and move the court to set aside the orders and judgments herein and grant to them a new trial and rehearing of the same, for the following reasons, to wit:

1st. The court erred in sustaining the demurrers of the said district attorney to the second & third defences contained in said defendants' answer.

2. The court erred in sustaining said motion of said district
19 attorney to strike out irrelevant & redundant matter from the said defendants' first defence in his answer.

3d. Said court erred in rendering a judgment upon the facts found against these defendants, Hart & Stahl.

4th. Said judgment was given in favor of the plaintiff, whereas by the law of the land it should have been given in favor of these defendants.

5th. The questions involved are new and difficult, arising upon the construction and operation of recent statutes, and a further investigation and consideration of the same would be just and proper.

By J. M. LEMMON & H. GOODWIN,
Their Attorneys.

Demurrer sustained.

And afterward, to wit, at the January term of said court, to wit, on the 13th day of March, A. D. 1873, came the parties, by their attorneys, and this cause coming on to be heard upon the demurrer of the district attorney of the United States to the second and third defences set forth in the separate answers of the defendants, Gotlieb Hart & George Stahl, and was argued by counsel, and on consideration whereof the court are of the opinion that said demurrer is well taken, and that the facts set forth in said second and third defences of said Hart & Stahl are not in law a sufficient defence to the plaintiff's action, and it is therefore ordered and adjudged that said demurrer be sustained.

Ex. by def'ts, Hart & Stahl.

And to the opinion and judgment of the court in that behalf, the defendants, Gotlieb Hart & George Stahl, by their attorneys, excepted.

Mo. to strike out sustained.

And thereupon this cause coming on further to be heard upon the motion of said district attorney to strike out irrelevant and redundant matter from the first defence of said Hart & Stahl, was argued by counsel, and the court on consideration thereof, do order that said motion be sustained, and the matters in said motion represented as redundant be stricken out of said first defence, to which ruling of the court in that behalf the said defendants, Hart & Stahl, by their attorneys, excepted.

Ex. by def'ts, Hart & Stahl.

And thereupon the cause came on to be heard upon the issues joined between the plaintiff and the remaining matters alleged in said first defence, and neither party requiring a jury, the cause was submitted to the court, and the court found the following facts:

Finding of facts.

1st. The defendants, Gotlieb Hart & George Stahl, were sureties of said Hosmer, and signed said bond without consideration other than as the sureties of said Hosmer.

2d. That said bond was signed by Hosmer, Hart, & Stahl on the 29th day of May, A. D. 1871, and was by said Hosmer handed to Deputy Assessor Rosenbaum, at Sandusky, Erie County, Ohio, on the 1st day of June, A. D. 1871, to be by him transmitted to James Lewis, the assessor of the 9th district of Ohio, who lived at Bucyrus, Crawford County Ohio, and the same was approved by him on the 5th day of June, A. D. 1871, and transmitted in due course of mail to the revenue collector of said district at Sandusky.

3d. The facts set forth in the 2d & 3rd defences of said Hart & Stahl are true.

4th. That upon the inquiry and assessment of the damages the court find that the tax which had been imposed upon the spirits distilled by said Hosmer, and which remained unpaid, as averred in the petition, amounted, on the first day of March, A. D. 1872, to the sum of ($2,893.70) two thousand eight hundred and ninety-three dollars and seventy cents, and that there is now due, including interest to this date, the sum of ($3,048.40) three thousand & forty-eight dollars and forty cents.

Judgment.

It is therefore ordered and adjudged by the court that the plaintiff recover of said defendants, Theodore Hosmer, Gotlieb Hart,
21 & George Stahl, said sum of $3,048.40, in form aforesaid assessed, and the plaintiff's costs herein expended to be taxed.

Ex. by def'ts.

To which judgment in that behalf the said defendants, Hart & Stahl, excepted.

And thereupon the attorneys for said Hart & Stahl moved the court to set aside said order and judgments and grant them a rehearing and new trial of all the matters aforesaid, for the reasons set forth in said motion on file.

Continued &c.—Motion for rehearing, &c., overruled.—Exception by def'ts.

And thereupon this cause was continued from term to term of said court until the October term thereof, A. D. 1874, at which said October term, to wit, on the 16th day of December, A. D. 1874, this cause came on this day to be heard upon the motion of the said defendants, Gotlieb Hart and George Stahl, to set aside the orders and judgments herein, and for a new trial and rehearing in this cause, and was argued by the counsel for the respective parties. On consideration whereof it is ordered that said motion be, and the same is hereby, overruled, to which order the said defendants, by H. Goodwin, their attorney, except.

22 NORTHERN DISTRICT OF OHIO, *ss:*

It is hereby certified that the foregoing is truly taken and copied from the record and proceedings of the circuit court of the United States within and for the district aforesaid.

Witness my official signature and the seal of said court at Cleveland, in said district, this 6th day of August, A. D. 1875.

[SEAL.]

EARL BILL,
Clerk of said Court,
By CHAS. H. BILL,
Deputy Clerk.

The appearance of Gotleib Hart & George Stahl, the plaintiffs in error, is hereby entered by—

HOMER GOODWIN,
Att'y for Pl'ffs in Error.

(Indorsed:) No. 2332. U. S. circuit court north. dist. Ohio. The United States v. Theodore Hosmer et al. Exemplification of record. Cl'k bill for this trans., $8.95.

(Indorsement on cover:) No. 98. Gotleib Hart and George Stahl, plaintiffs in error, vs. The United States of America. N. Ohio C. C. U. S. Filed 25th August, 1875.

SUPREME COURT OF THE UNITED STATES.

GOTTLIEB HART and GEO. STAHL,
Pl'ffs in Error,
vs.
THE UNITED STATES OF AMERICA,
Def't in Error.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR NORTHERN DISTRICT OF OHIO.

This suit was brought by the United States, in the Court below—May 29th, 1872—upon a Distiller's Bond, claimed to have been executed under the 7th Sec. of the Act of July 20th, 1868, (15th Stats. at Large, 127,) against Theodore Hosmer, (who was the distiller and principal in the bond), and Gottlieb Hart and George Stahl, his sureties, who were defendants in the Court below, to recover $3,000, claimed to be due for taxes on 6,000 gallons of spirits distilled by Hosmer.

The petition recited that on the 29th day of May, 1871, the said Hosmer, Hart and Stahl made their writing obligatory, signed and sealed by them, and delivered to the plaintiff. And thereby acknowledged themselves to be held and bound unto The United States of America in the sum of $5,000, for the payment whereof well and truly to be made, they did thereby bind themselves, their heirs, etc., jointly and severally: which said writing

obligatory is and was subject to a condition thereunder written; whereby it is and was provided: "that whereas the said Theodore Hosmer now, or intends on and after the first day of June, A. D. 1871, to be engaged in the business of a distiller, within the 9th collection-district of the State of Ohio, to-wit: at 21 and 22 Water street, situate in the city of Sandusky, county of Erie and State of Ohio aforesaid. Now therefore, if the said Theodore Hosmer shall, in all respects faithfully, comply with all the provisions of law in relation to the duties and business of distillers, and shall pay all penalties incurred, or fines imposed on him, for a violation of any of the said provisions, and shall not suffer the tract or lot of land on which the distillery stands, or any part thereof, or any of the distillery apparatus to be encumbered by any mortgage, judgment or other lien during the term in which he shall carry on said business, then this obligation shall be void; otherwise it shall remain in full force.

That from the 1st day of June, 1871, to the 1st day of March, 1872, at said District, the said Hosmer was, and continued to be engaged in the business of a distiller: and as such distiller did during said period distill a large amount of spirits, to-wit: 6,000 gallons, on which spirits he, as such distiller, was bound to pay the taxes then and there imposed by law, to-wit: the sum of $3,000. Yet the said Hosmer though specially demanded and requested so to do, agreeably to the conditions of said writing obligatory, to-wit: on the 1st day of March, A. D. 1872, wholly neglected and refused to pay said taxes or any part thereof.

And the plaintiff demanded judgment for $3,000 and interest from the 1st day of March, 1872. On the 12th day of November,

1872, the defendants, Hart and Stahl, filed their answer in three paragraphs or defences, as follows:

ANSWER.

The United States, Pl'ff,
vs.
Theodore Hosmer, Gottlieb Hart and George Stahl, Defts.

In the Circuit Court of the United States, Northern District of Ohio.

First Defence.—The defendants, Gottlieb Hart and George Stahl, now come, and separately from said Hosmer, answering the petition of the plaintiff; they deny that said bond in the petition described was ever delivered to the said plaintiff. They deny that the assessor of said 9th collection district had any authority of law to approve said bond or writing obligatory, and deny that the collector, or any other officer of the plaintiff, had any authority to receive the same; and they deny that there is anything due from them upon said obligation; and all allegations of the petition to that effect are denied.

Second Defence.—And for a second defence these defendants say that the plaintiff its action aforesaid ought not to have against them, because they say that these defendants, at the time they signed said bond, were the sureties only of said Hosmer, and signed it merely for his accommodation and without other consideration, as the officers of the plaintiff who conducted the transaction well knew; and that when they signed said bond they supposed, and by the officers of said plaintiff were given to understand, that the said instrument was one of those distiller's bonds which, by act of Congress in such case made and provided, was

authorized to be taken and approved; but, on the contrary, they say, that at the time the bond set out in the petition was executed, the defendant Hosmer was the owner of the lots and premises described in the petition on which the said distillery and distillery apparatus was situated, and being parts of lots numbers twenty-one and twenty-two Water street, in the City of Sandusky, Erie County, Ohio, in fee.

And they say that said Hosmer had, prior to that time and subsequent to July 20th, 1868, to-wit, on the 23d day of May, 1871, for a valuable consideration, executed and delivered to one John Dempsey a mortgage upon said lots and premises on which said distillery and distillery apparatus stood, to secure the payment to said Dempsey of a bona fide debt of said Hosmer, in the sum of two thousand six hundred and eighty-one and 53-100 dollars, and which mortgage had been duly recorded in the recorder's office of said Erie County on the 25th day of May, A. D. 1871, but the existence of said mortgage was entirely unknown to these defendants. And these defendants say, that the officers of said plaintiff having the matter in charge did not, nor did either of them, require of said Hosmer, nor did he at any time file with the assessor, the written consent of said Dempsey, the mortgagee, duly acknowledged, that the premises might be used for the purpose of distilling spirits subject to the provisions of law, and stipulating that the lien of the United States for taxes and penalty should have priority to said mortgage, and in case of forfeiture of said premises, or any part thereof, the title of the same should rest in the United States, discharged of said mortgage: nor did said Hosmer execute, nor did they require of him to execute, a

bond to indemnify against said mortgage, as is provided by the act of Congress (passed April 10, 1869,) entitled "An act to amend an act entitled 'An act imposing taxes on distilled spirits and tobacco, and other purposes,' approved July 20th, 1868." But the said Assessor approved said bond without such written consent filed or bond taken.

And these defendants further say that by reason of the non-payment, by said Hosmer, of the taxes upon the spirits distilled by him, and which were chargeable and a lien upon said premises, under the provisions of the law, on or about the 29th day of March, A. D. 1872, Clark Center, the collector of internal revenue for the 9th District of Ohio, issued to H. F. Spencer, his deputy collector, a warrant of distraint, by virtue of which said deputy, on the 29th day of March, A. D. 1872, levied upon 26 feet front and rear off the east side of Water street, lot number twenty-two (22), and (40) forty feet in width off the west side of Water street, lot number twenty-one (21) (with and subject to the right of passage-way off and adjoining the east side thereof), in the city of Sandusky, Erie County, Ohio, together with all the fixtures and appurtenances thereto belonging, and the said distillery and distillery apparatus; and the said deputy collector advertised the same for sale, and sold the same at 2 o'clock p. m. on the 30th day of April, 1872, for sixty-one hundred (6,100) dollars, to said John Dempsey, the mortgagee, and the amount due upon his mortgage at that time, and which was paid out of the purchase money, was about twenty-seven hundred and thirty-three and 31-100 dollars, and had it not been for the existence of said mortgage, the amount due for the taxes and penalty from

said Hosmer to the plaintiff would have been fully paid, and all costs of seizure and sale out of the proceeds of said property. These defendants therefore pray judgment whether the plaintiff its action aforesaid ought to have or maintain against them.

THIRD DEFENCE.—And for a further defence these defendants say that the plaintiff its action aforesaid ought not to have or maintain against them, because they say that all the taxes which the plaintiff is entitled to charge against said Hosmer, and which said Hosmer was bound to pay, (these defendants denying that said Hosmer distilled 6,000 gallons of spirits on which taxes were unpaid, and denying that the sum of $3,000 in taxes was lawfully imposed thereon,) were assessed on spirits distilled by said Hosmer at his said distillery, and that said taxes were a first and paramount lien upon said spirits, and the said spirits were deposited in the bonded warehouse of the plaintiff, and under the sole control of the plaintiff's officers; yet the collector of internal revenue for said district permitted said Hosmer to remove and dispose of and convert to his own use a large amount of said spirits, to-wit, five thousand gallons, from the bonded warehouse of the said plaintiff, and more than enough to pay all the taxes chargeable thereon, and more than enough to pay any just claim of the plaintiff against said Hosmer for taxes; and this they did without first receiving payment of the taxes thereon, and which are claimed in the petition, and without the knowledge or assent of these defendants.

To these defences on the 16th of November, 1872, the plaintiff filed a general demurrer to the 2d and 3d counts, and on the 18th of November filed a motion to strike out from the 1st defence the

following words, to-wit: "They deny that the assessor of the "9th collection district of Ohio had any authority of law to ap- "prove said bond or writing obligatory, and deny that the col- "lector, or any other officer of the plaintiff, had any authority to "receive the same."

The Court on hearing sustained the demurrer and the motion to strike out, to which ruling the defendant excepted.

The defendants moved for a rehearing or new trial; the motion was overruled, and defendants excepted, whereupon the cause was submitted to the Court, and judgment rendered for the plaintiff against the defendants. The Court found the facts, and that the allegations in the 2d and 3d defences were true.

In the argument of the question we advance the following propositions:

I. THE COURT ERRED IN SUSTAINING THE DEMURRER TO THE FIRST AND SECOND DEFENCE.

And now we desire to call the attention of the Court to the sections of the statute which affect the questions.

The statute of July 20th, 1868, is found in the 15th Vol. of the Statutes at Large, page 125.

The 15th Section of that statute provides "That every distil- "ler shall provide, at his own expense, a *warehouse*, to be situated "on and to constitute a part of his distillery premises, to be used "*only* for the storage of distilled spirits, of his own manufacture; "* * * and such warehouse * * shall be "under the direction and control of the collector of the district, "and in charge of an internal revenue store-keeper, assigned thereto by the commissioner of internal revenue; and the tax on

" the spirits stored in such warehouse *shall be paid before removal* " from such warehouse."

The 23d Section provides that the " distiller shall give his bond " in duplicate * * * conditioned that the princi- " pal named in said bond will pay the tax on the spirits as speci- " fied in the entry, or cause them to be paid before removal from " said distillery warehouse." We claim that this bond, if any, is to secure the payment of the tax.

The 1st Section provides " That there shall be levied and col- " lected on all distilled spirits on which the tax prescribed by law " has not been paid, a tax of fifty cents on every proof gallon, to " be paid by the distiller, owner, or person having possession " thereof *before removal from distillery warehouse.* * *

" Every proprietor of a still, distillery, or distilling apparatus, " and every person in any manner interested in the use of such " distillery, or distilling apparatus, shall be jointly and severally " liable for the taxes imposed by law on the distilled spirits pro- " duced therefrom, and the tax shall be a FIRST LIEN on the spir- " its distilled, the *distillery* used for the distilling the same, the " *still, vessels, fixtures,* and *tools therein* and on *the tract of land* " whereon the said distillery is situated, together with any *build-* " *ing thereon,* from the time said spirits are distilled until the tax " shall be paid."

If the Government is not sufficiently secured for the payment of the tax on spirits distilled, it is not because the law has not made provisions enough to accomplish such security.

They have—1st, The liability of the distiller; 2d, It is a first lien on the spirits distilled; 3d, The distillery used for distilling

the same; 4th, The stills; 5th, Vessels; 6th, Fixtures; 7th, Tools therein; 8th, The lot or tract of land whereon the said distillery is situated; 9th, Any buildings thereon; 10th, The bond to be given under the 23d section; 11th, The storekeeper for the United States has the entire possession of the spirits distilled, and they are not to be removed until the tax is paid; and 12th, The distiller's bond, if indeed it was intended that this should be a security for the payment of the tax. Taking the language of the 7th section in connexion with the other provisions of the statute, especially the provisions in the 11th and 23d sections, one would hardly come to that conclusion.

And with regard to this *lien*, this Court, in the case of The United States v. Boecker, (21 Wallace, 656,) says: "In such cases "the United States having a lien, the surety is entitled to the "benefit of it."

And now in order that this security shall avail them, in order that it shall not elude the Government, in order that they may hold it for their own benefit, and the benefit of the security, the most stringent provisions are made.

The 7th section provides for the giving of the bond. "The "condition of the bond shall be that the principal shall faithful- "ly comply with the provisions of law in relation to the duties "and business of distillers," (the quere is whether this language refers to the payment of the taxes from time to time assessed, or to those duties and methods of conducting the business which the statute with such particularity enjoins,) "and will pay," (not all taxes, but) "all penalties incurred or fines imposed on him for a violation of any of the said provisions; that he *will not suffer* the lot or tract of land on which the distillery stands, or any

"part thereof, or of any of the distillery apparatus, *to be encum-*
"*bered* by mortgage or judgment, or other lien during the time
"in which he shall carry on said business.

"The assessor may refuse to approve said bond when in his
"judgment the situation of the distillery is such as will enable
"the distiller to defraud the United States."

The section further provides for the giving of a new bond in case the sureties are insufficient, and provides for forfeiture and punishment in case the distiller refuses to give a bond, or gives a false, forged or fraudulent bond.

The 8th section provides, "that no bond of a distiller shall be
"approved unless he is the owner *in fee*, unincumbered by any
"mortgage, judgment, or other lien on the lot or tract of land on
"which the distillery is situated, or unless he files with the as-
"sessor, in connection with his notice, the written consent of the
"owner of the fee, and (if any mortgage of any mortgagee, judgment
"creditor, or other person having a lien thereon, duly acknowl-
"edged that the premises may be used for the purpose of distilling
"spirits subject to the provisions of law, and expressly stipulating
"that the lien of the United States for taxes and penalties shall
"have priority of such mortgage judgment, or other incumbrance,
"and that in case of forfeiture of the distillery premises, or any
"part thereof, the title of the same shall vest in the United States,
"discharged from any such mortgage, judgment, or other en-
"cumbrance." This section of the statute further provided that
"in any case where the owner of a distillery, or distillery appara-
"tus, *erected prior to the passage of this act*, has an estate for a
"term of years only, in the lot or tract of land on which the dis-
"tillery is situated. * * The value of such lot or tract

"of land, together with the building and distillery apparatus, "shall be appraised * * and the assessor is authorized "to accept, in lieu of the consent of the owner in fee, the bond of "said distiller, with not less than two sureties, * * equal "to such appraised value."

So that, it appears, the assessor was not authorized to approve a bond unless the distiller was the owner of an unincumbered fee, or if incumbered, that he would get the incumbrance out of the way.

In case the distillery had been erected before the passage of the act of July 20th, 1868, he might approve a bond of a distiller who only held a leasehold estate, if the distiller would give another bond making the security of the United States equivalent to a fee.

This Section 8 was amended by the act of April 19, 1869, (16th State at large, p. 41,) which provided that in case a distillery or distillery apparatus, erected "prior to the 20th of July, 1868, on "a tract of land held under a lease which was not required to be "recorded * * or where the owner is possessed of the "fee, but incumbered with a mortgage executed and duly recorded "*previous* to said 20th of July, 1868, and not due * * "a bond may be taken at the discretion of the commissioner * "* provided that nothing herein contained shall be so construed "as to apply to any distillery, or distillery apparatus not erected "prior to the 20th of July, 1868."

So that this amendment to the 8th Section could not apply to the case at bar; 1st, because said Dempsey's mortgage was not made prior to said 20th of July, 1868, and 2d, because said distillery and distillery apparatus does not appear to have been erected prior to July 20, 1868, and was not in fact.

Recurring, then, to the argument, we say that the Court erred in overruling the demurrer to the 2d ground of defence, and that to hold the sureties responsible would be a fraud upon the sureties. These sureties had the right to suppose, when asked to sign this bond, that the bond was one of those which the law permitted, and that the provisions of the law requiring the giving of the bond had been complied with; especially where those provisions required duties of the sworn officers of the Government, and that they would not be ensnared by a neglect, omission, or illegal conduct on the part of the officers of the Government. Indeed, if we consider the matter, we shall see that they could have thought of nothing less.

Two propositions are exceedingly certain. 1st, The officers of the Government had no authority to approve the bond. The language of the law is, "that *no bond* of a distiller *shall be approved* "unless he is the owner in fee, unincumbered by any mortgage," etc., and 2d, That if the law had been complied with, and the distillery property had been subject to the "*lien*" of the tax, the taxes would have been paid, and there would have been no loss to the Government, and no claim would have been made against the sureties. It may be said that these provisions of the statute were made for the benefit of the Government and not for the benefit of the sureties, and this is probably true. But will you permit the officers of the Government to shut their eyes to their plain duties and violate their obligations, and thus entrap and ensnare the sureties, and get them into a difficulty that would not have occurred if they had complied with the provisions of the law? Such a course would not be tolerated if the agents of the party had been those of an individual instead of the Government. The Government

can only act and be known by its officers, and any individual in making contracts with the Government, have a right to the confidence that the officers truly represent it. It may be claimed that the sureties should see to it that the provisions of the law were complied with before they signed the bond; but we sincerely ask, is this the usual course of business in transactions of that kind? or have the sureties the right to repose confidence in the idea that the law—in a case where the laws regulate the whole transaction—has been complied with, by those whose business it is to understand the complicated provisions of the law upon the subject? and have they the right not to be misled by the officers of the Government? The sureties certainly could not do *their work for* the officers of the Government. They could not direct or control them in the exercise of their duties. The sureties could in no way influence or modify their official action. But will you say they can refuse to sign the bond until the law has been complied with? Must it be required of men who have no interest in the transaction to correctly thread all the labyrinths of the law, and find out when its provisions have been so far complied with as to form the basis of the contract which the bond contains? Here is an agreement to be entered into between the Government and individuals. And among the persons who come together to make that agreement, which of them are supposed to be the most capable of understanding the provisions of the law, and finding out whether a basis had been attained which would allow the agreement to be made? And if one puts confidence in another whose business it is to understand the facts, shall the surety be blamed because such confidence is exercised? Or has he the right to rely

upon the idea that officers of the Government are *rightfully* performing their official duties? Does not the Government hold those officers out to the world as competent and willing to perform their official acts according to the regulations of law? Or is the citizen to see to it that they do their duties correctly?

Hosmer might be required to see to it that the provisions of the law upon that subject had been complied with. But we insist that the same obligation is not incumbent upon the surety. It is not the usual course for the sureties to investigate the legal character of the transactions to which they become parties by signing their names as sureties. They are asked to put their names to a bond, and it would not occur to one man in a million to inquire whether the property on which the distillery was situated had been freed from mortgage, and he could know very little about the significance of the fact if he did. His only inquiry would be: Can I help my friend Hosmer by doing so, and will it be safe? But *this case goes beyond* that. The averment in the answer is, that when they signed the bond they not only supposed, but "by the officers of said plaintiff, were *given to* "*understand*, that the said instrument was one of those distiller's "bonds, which, by the act of Congress in such case made and "provided, was authorized to be taken and approved." By this it appears that the officers of the Government *directly interfered to mislead* the defendants. Could there be a particle of doubt, that if these were agents of an individual, instead of the agents of the Government, that the sureties could not be held?

Says Nott, J., in the case of Brown v. The United States (11 Law Reg., N. S., 188.) "We cannot sustain a defence on the "part of the Government, which if set up by an ordinary de-

"fendant, it would be held illegal, inequitable or unconscionable." And McLean, J., in the case of Hunter v. The United States (5 Peters R., 185,) says: "The same rules of contract are appli- "cable where the sovereign is a party, as between individuals."

If the facts were misrepresented to the surety, or the obliger of the bond, or his agents who took the bond, and acting upon such misrepresentation, he has been misled to his injury, we suppose there could be no difference of opinion as to the law that in such case the surety could not be held upon the bond. It would certainly be unjust and outrageous.

The principle is very well laid down in the case of Stone v. Compton, (5 Bingham N. S. 142; 35 Eng. Com. L. 64,) by Tindal, J. "Now the principle to be drawn from the cases to which refer- "ence has been made in the course of argument, we take to be "this: that if, with the knowledge or assent of the creditor, any "material part of the transaction between the creditor and his "debtor is misrepresented to the surety, the misrepresentation "being such that but for the same having taken place, either the "suretyship would not have been entered into at all, or, being "entered into, the extent of the surety's liability might be "thereby increased, the security so given is void at law, on the "ground of fraud."

See also Seltzer v. Brock, 3d Ohio St., 907.

The case of the People v. Jansen (7 Johns. 339,) was a case where the People, the sovereign, sued on a bond given as one of the loan officers of Ulster County, pursuant to a statute, that one Tappan "should well and truly perform the office and duty of "one of the loan officers of Ulster County."

And Thompson, in giving the opinion of the Court, admits

that in ordinary cases "mere delay in calling upon the principal "will not discharge this surety." He admits the general doctrine upon that subject.

This was a case where the Government of New York were bringing suit. * * * And he says: "This case "differs essentially from the ordinary case of a security on a bond "to a private individual. In such case, the obligee is under no "positive injunction, or legal obligation to watch over the conduct of the principal debtor, and at stated periods to examine "into his accounts, and in case of failure of punctual payment, "to adopt measures calculated to relieve the security. The risk "of the insolvency of the principal is assumed by the surety, "and the liability of the latter continues, unless he should at "least require of the creditor to enforce payment. But the situation of the security in this case is widely different. The "statute under which the bond was taken, makes it the duty of "the supervisors in each county, together with one or more of "the Judges of the Common Pleas, annually to meet and carefully to inspect and examine the minutes and accounts af the "loan officers, and if it be found that any loan officer has refused "to perform the duty enjoined upon him, they are directed to "elect another in his stead. *The security had a right to look to "the provisions of this statute and to calculate his liability on the "presumption that the duties enjoined on these public officers would "be faithfully and punctually discharged.*"

And now we say that it would seem as though these sureties would have the right when they put their names to this bond, to rely upon the fact that the proceedings were in conformity to the statutes, and that the officers of the law had performed their

duties. Indeed, they could not have supposed anything less than that.

The case of the United States v. Kirkpatrick (9 Wheat. 720,) was much relied upon by the plaintiff and the Court below. That was a case where the defense sought to defend upon the ground that "the laws require that settlements should be made "at short and stated periods; and that the sureties have the "right to look to this as their security." This was a case where there was laches in not proceeding to collect the amount due, and by all the authorities everywhere, this has never been held as a defense; and this we fully concede. If here were a case where the agents of the Government had delayed the enforcement of the claim, we concede that would be no defence.

Indeed, Judge Story puts it upon that principle. He says:

"It is admitted that mere laches, unaccompanied with fraud, "forms no discharge of a contract of this nature between pri- "vate individuals, such is the clear result of the authorities: "why, then, should a more rigid principle be applied to the Gov- "ernment?"

This seems to admit that the same principles apply against the Government as an individual. The Judge says further:

"No case has been cited at the bar, in support of the doctrine "except that of the People v. Jansen (7 Johns. Rep. 332.) In "respect to that case, it may be observed that it is distinguisha- "ble from the present one in some of its leading circumstances, "but if it were not, we are not prepared to yield to its author- "ity."

Now, we do not understand that case of the People v. Jansen to go upon the ground that *mere laches* would discharge the sure-

ties. The "distinguishable feature" of that case was that the supervisors did not *remove the loan officers* after their default, as the statute required them to do, but suffered them to continue for several years. Their not doing so would be no defence for a surety in reference to a default of a principal that had already occurred, but would it not be one which occurred after?

The case at bar is not a case where there has been laches after the bond was entered into, but in approving the bond at all. It was no case of neglect, but one of positive misfeasance. They had no right to approve the bond at all. The statute prohibited it.

They had no right to authorize a distillery in THAT PLACE. The language is, "no bond shall be approved," etc.; and in the 7th section. "The assessor may refuse to approve said bond, "when in his judgment the situation of the distillery is such as "would enable the distiller to defraud the United States."

This property, on which the tax was to be a lien, was incumbered with a mortgage, and the *place* was just as much prohibited as though it had been in Canada. This was urged upon the Court below. We inquired whether, if after notice of a distillery to be started on these premises, the distiller had located the distillery in Canada, it would have made no difference with the sureties? And the Court replied that it would not—they would still be bound. We *could not see* this then, and we cannot now.

When this case was argued in the Court below, the case of Osborn v. The United States (19 Wall. 577) was not before us, although it was when the motion for a re-hearing was argued.

That case seems to have been brought upon the bond to recover for unpaid revenue taxes; and it would seem to be an authority

to the effect that such a claim would be within the provisons of the bond. The point seems, however, not to have been made or considered. It is perhaps presumptuous to urge it here. But it still occurs to us that the interest of the law-makers was to secure by this bond; that the business should be organized and conducted according to the provisions of the statute; and the payment of the penalties which might be imposed; and that the law relied upon the other securities for the payment of the tax. The penalty of the bond is in no way adequate to secure the payment of the tax; and it was only required to be in "double "the amount of tax on spirits that can be distilled at his distil- "lery during a period of fifteen days."

But the case of Osborn goes farther. It seems to hold that though the premises were incumbered by a mortgage, yet that would not relieve the sureties. And the Court hold that the assessor owed no duty to the sureties. But that case differs from the case at bar in this, to wit: In our case, we aver that the officers of the plaintiff who conducted the transaction when the sureties signed the bond, "gave them to understand, that the "said instrument was one of those distiller's bonds, which, by "the act of Congress, in such case made and provided, was au- "thorized to be taken and approved."

If they were under no obligations to the sureties to see to it, that no bond should be approved until the premises were clear, yet they were under obligations *not to misrepresent* the transaction, *nor to mislead* the sureties into a liability that they would not have assumed had they known the truth. The duty of the officers came in after the bond had been made. If the mortgage was there when they signed, they had the right to suppose that

it would be removed before it would be approved. If these officers had been the agents of an individual, can there be a particle of doubt but that the sureties would have been discharged?

In 3d Leading Cases in Equity, (Side p. 816) the law is thus carefully laid down.

"In examining the cases upon this subject, it must be kept in "mind that the intimate nature of the relation between the "parties to the contract of suretyship, requires that perfect good "faith should be adhered to by them. Whenever, therefore, "there is any *misrepresentation*, or even concealment, from the "surety, of any material fact, which, had he been aware of, he "*might not* have entered into the contract of suretyship, it wil "thereby be rendered invalid, and the surety will be discharged "from his liabilities," and a long list of authorities are cited for the proposition.

Judge Story, in his Equity Jurisprudence, (Vol. 1, § 325,) asserts:

"Indeed, the proposition may be stated in a more general form: "That, if a creditor does any act injurious to the surety, or in"consistent with his rights; or if he omits to do any act, when "required by the surety, which his duty enjoins him to do, and "the omission proves injurious to the surety: in all such cases "the latter will be discharged, and he may set up such conduct "as a defence to any suit brought against him, if not at law, at "all events in equity."

And § 333. "But the great class of cases, in which relief is "granted, under this third head of constructive fraud, is, that, "where the contract or other act is substantially a fraud upon "the rights, interests, duties, or intentions of third persons.

"And, here, the general rule is, that particular persons, in con-
"tracts and other acts, shall not only transact *bona fide* between
"themselves, but shall not transact *mala fide* in respect to other
"persons, who stand in such a relation to either, as to be affected
"by the contract or the conveyances of it. And, as the rest of
"mankind, besides the parties contracting, are concerned, the
"rule is properly said to be governed by public utility."

This was a bond not permitted, but *prohibited*, by law. It was against the express provisions of the statute that it was approved. We say it could not take effect; and for the reason that the property was incumbered, and the language of the Court, in the case of The United States v. Borcker (21 Wall., 656,) is directly applicable. "If the proposition of the counsel for the United "States were sustained, the designation of the place, as in this "bond, instead of affording a *limitation* and a *safeguard* to the "surety, might prove but a *delusion* and *a snare*, and subject him "to liabilities which *he could not have foreseen*, and to the hazard "of which he would not knowingly have exposed himself. In "such cases the United States, *having a lien, the surety is entitled* "*to the benefit of it.* He might be willing to bind himself where "the lien was upon one piece or parcel of property, and unwill-"ing where it was upon another. His ultimate immunity or lia-"bility might depend *wholly upon the value of the premises.* He "had the option to assume the risk or not. This element may "have controlled the exercise of his election.

"Viewing the subject in the light of these considerations, we "cannot assent to the view expressed by the counsel for the Gov-"ernment. On the contrary, we think this term of the bond is "of the essence of the contract. It is hardly less so than the

"amount of the penalty. One defines the place where the lia-
"bility must arise, the other the maximum of that liability for
"which the sureties stipulated to be bound. The former can no
"more be held immaterial than the latter. No distillery having
"been carried on at the place named, the contract never took ef-
"fect. The event to which it referred did not occur. There
"could consequently be no liability within the letter or meaning
"of the contract. It was as if the agreement had been for the
"good conduct of a clerk while in the service of B, and the
"clerk never enters his service, but entered into the service of
"another distillery begun and carried on elsewhere, was no more
"within the obligation of the sureties than if it had been begun
"and carried on there or elsewhere by a person other than
"Boecker. No other place than that named is, under the cir-
"cumstances of this case, within the letter, spirit, or meaning of
"the bond. The specification has no elasticity. It cannot be
"made to extend the locality where the distillers here in ques-
"tion was placed. In Miller v. Stewart, this Court said, 'Noth-
"'ing can be clearer, both upon principal and authority, than
"'the doctrine that the liability of a surety is not to be extended
"'by implication beyond the terms of his contract. To the ex-
"'tent, and in the manner, and under the circumstances pointed
"'out in his obligation, he is bound, and no further. * *
"'It is not sufficient that he may sustain no injury by a change
"'in the contract, or that it may even be for his benefit. He
"'has a right to stand upon the very terms of his contract, and
"'if he does not assent to any variation of it, and a variation is
"'made, it is fatal.'"

II. The Court erred in Overruling the Demurrer to the Third Defence.

That defence alleges that this tax was a lien upon the spirits distilled, and was assessed on spirits, distilled by said Hosmer at his said distillery, and the said spirits were deposited in the bonded warehouse of the plaintiff, and under the sole control of the plaintiff's officers; yet the collector of internal revenue for said district permitted said Hosmer to remove and dispose of, and convert to his own use a large amount of said spirits, to wit: 5,000 gallons from the bonded warehouse of the said plaintiff, and more than enough to pay all the taxes chargeable thereon, and more than enough to pay any just claim of the plaintiff against said Hosmer for taxes; and this they did without first requiring payment of the taxes thereon, and which are claimed in the petition, and without the knowledge or assent of these defendants.

The demurrer admits, and the Court finds these facts to be true.

Here we have it alleged that the plaintiff had a perfect security in its hand, and yet permitted Hosmer to take it away and convert it to his own use without paying the United States. Surely, if this were the case of an individual, would there be a particle of doubt but that this would discharge the sureties.

If it is true, as stated by the Court, in the case of the United States v. Boecker, (21 Wall., 656,) that "in such cases, the United States having a lien, the sureties are entitled to the benefit "of it," then it is certainly true that the sureties could not get the benefit, if the officers and agents of the Government let it go out of their hands without first requiring the payment of the

tax as the law required. It presents the ordinary case of a principal giving up a security which is in his hands for the payment of a debt.

As held by the Court, in case of Commercial Bank v. Western Reserve Bank, (11 Ohio, 449,) "he may claim the benefit of every security, or aid, or means of payment, which the law, or "the providence of the debtor, or the vigilance of the creditor, "has provided for its payment. (5 Johns. Ch. 130.)

"Among these the most obvious is to drive the creditor to ex- "haust the judgment lien. His equity attaches to this, and he "may thus appropriate all its advantages to his protection."

In case of Trustees of Springfield Township v. Demott, (13 Ohio, 104,) it is held:

"The relinquishment of securities, or the release of liens, will "discharge the surety." See also Thorp v. United States. (Gallison, 32.)

In 2d American Leading Cases, 4th edition, p. 343, in notes to cases, Pain v. Packard; King v. Baldwin; the law is stated:

"But while there can be no doubt that the creditor may ab- "stain from the prosecution of active measures against the prin- "cipal, and even relinquish those which he has commenced, it is "equally certain that he should do nothing which can prejudice "the surety by impairing his rights and remedies, or interposing "an obstacle to the collection of the debt. Hence, while the "cases fully establish his right to remain quiescent, they treat "him as a defaulter in every instance *in which any hold is sur- "rendered*, or *lien* waived, which might have resulted in the dis- "charge of the debt and the exoneration of the surety. For "although the inaction of the creditors may be as injurious in

"some instances as any waiver or abandonment can be in others, "yet they necessarily differ in one material circumstance, that "the latter is wrongful, and the former the mere exercise of an "undoubted right."

The author fully discusses the subject and cites the authorities on pages 343, 344, 345, 346, 347, 351, 352 and 353, and to which, without quoting, we ask the attention of the Court.

We do not dispute the doctrine that mere laches, or neglect to collect the debt, or apply the securities will not discharge the sureties. But we insist that if securities are given up, the surety will be discharged. The law nails the security to the debt, and whoever pays the debt is entitled to the security.

In the Court below it was insisted, and so the Court held, that while this doctrine will apply to a case where the securities were held as a collateral at the time the debt was contracted; yet the doctrine did not apply when the security is obtained afterwards. There certainly is no reason or sense in any such limitation, and we say there is no such. And the case of Baker v. Briggs, (8 Pick. 122,) is an authority directly in point. Says our author, on page 345: "The question arose, in Baker v. Briggs, "(8 Pick., 122,) where the surrender of a horse and gig to the "principal, which had been received from him as a security for the debt, *subsequently to the period* at which it was contracted s held to be a defence to a suit against the surety, who was to be exonerated in every instance, in which the creditor uishes assets or effects of any description, which might n made available for the purpose of satisfaction or pay- is a well settled principle of equity,' said Parker, om the opinion of the Court was delivered, 'that

"'a creditor who has the personal contract of his debtor with a "'surety, and has also, *or takes afterwards*, property from the "'principal, as a pledge or security for his debt, is to hold the "'property fairly and impartially for the benefit of the surety, "'as well as himself; and if he parts with it, without the knowl- "'edge or against the will of the surety, he shall lose his claim "'against the surety, to the amount of the property so surren- "'dered.'"

We can make this case, (we mean the question arising on the third defence,) no plainer than it is made by the authorities.

As stated by the Court, in the case of Butler v. Birkey *et al.*, (13 O. St. Rep., 523.) "Now it is a well established doctrine, "that when a surety pays the debt of his principal, that he is, "upon such payment, entitled to the benefit of all collateral se- "curities, both legal and equitable, held by the creditor as an "additional assurance of payment," and as said by this Court in 21 Wallace, 656: "In such cases, the United States having a "lien, the surety is entitled to the benefit of it."

And now the Government by its officers have deliberately put it out of the power of the sureties to avail themselves of this *first lien* upon the spirits distilled. Surely there can be no question but that if, upon the application of the plaintiff, we had paid the tax while the spirits were still in the bonded warehouse that we would have been subrogated to this lien. They have released their security, put it out of the power of any body to subject any portion of the "spirits distilled" to the payment of the debt and now turn around and sue us. Is that right? Is it just? Is it honest? It would not be called so in the case of an individual.

Will it be claimed that there are any technical objections to the language of the answer? There was none in the Court below. The rule of the code is that the most liberal construction shall be put upon the allegations, and for the purpose of promoting justice. (19 O. St. Rep., 553.)

III. We say the Court erred in striking out the averment in the first defence the words, "they deny that "the assessor of said 9th Collection District of Ohio "had any authority of law to approve said bond or "writing obligatory, and deny that the Collector, or "any other officer of the plaintiff, had any author- "ity to receive the same."

Here are allegations that the approval and the receipt or delivery of the bond were illegal.

It will not be disputed but that the law prohibited such a bond from being approved, and if the approval is prohibited the delivery would in like manner be prohibited. It is right here that the whole transaction begins to be illegal. Right here the law would have called a halt and said to the parties not to proceed another step until this matter had been made to conform to the law.

But the question here goes a great way beyond all questions of that kind. This was stricken out as redundant and irrelevant matter. And this ruling was equivalent to saying to the defendants that in this case no testimony would be allowed in the case showing that the said assessor had no authority to approve that bond, and none that he or any other officers of the Government had no right to receive it.

If the collector well knew that Hosmer had no distillery at the place designated, but in Canada; that he had no intention of carrying on business in Ohio, but in Canada; still this would be no defence for the sureties. Indeed, no matter for what reason the bond was illegal, and consequently the assessor had no right to receive it. Still if that were so, yet the defendants are told that that is no defence for them. It may be urged that the allegations do not inform for what reason the assessor had no authority to approve or receive that bond. But will you *strike out* the allegation for that reason, or will you move that it be made more definite and certain.

Clay v. Edgerton, 19 O. St. Rep., 553.
Lewis v. Coultor, 10 O. St. Rep., 452.

We insist that here is no case where a bond was given—good when given, but claimed that the sureties are discharged through the laches of the principal—but a bond that *never was* valid as against the sureties.

We fully admit the doctrine, that if this bond had bound the sureties when made, that the laches of the public officers in not performing this duty would discharge the sureties. But this is not such a case. Here is a case where the bond was illegal. The officers of the plaintiff directly misled the sureties into signing it.

NOTE.—There is a little discrepancy in the record. It would appear that the motion for a rehearing was made before the sustaining of the demurrer. This was not so in fact. The Judge sustained the demurrer, but said he would allow the defendants to file a motion for rehearing, and it could be heard before the Circuit Judge. This was done and the sustaining of the demurrer was not journalized until after the filing of the motion. But it is a matter of no importance, since the questions all arise upon the finding of the facts. The Court find the facts set forth in the 2d and 3d defences to be true.

A. G. Riddle
for Plaintiff in Error

IN THE SUPREME COURT, U. S.

GOTTLIEB HART & JOHN STAHL.

VS.

UNITED STATES OF AMERICA.

ARGUMENT FOR PLAINTIFF IN ERROR, BY JOHN M. LEMMON.

IN THE SUPREME COURT, U. S.

GOTTLIEB HART, & JOHN STAHL.

VS

UNITED STATES OF AMERICA.

ARGUMENT FOR PLAINTIFF IN ERROR, BY JOHN M. LEMMON.

Petition was for recovery of Tax on six thousand gallons distilled Spirits, (viz $3000) distilled from June 1, 1871, to March 1, 1872.

Petition was under Ohio Code, and on a distillers bond, dated May 29. 1871, signed by Hosmer as principal, and Hart and Stahl as sureties.

The only breach alleged, was the non payment of the tax, of $3000.

Hosmer made no defense.

Hart and Stahl answered together, and alleged.

1 Denial that the bond sued upon, was ever delivered to the United States, or that the bond was legally approved by the assessor, or that he had any authority to approve it, or that there was anything due.

2 That they signed the bond as sureties only, as plaintiff and its officers well knew. That the instrument was a common distillers bond.

That at the time, Hosmer owned the lots 21 and 22 Water Street, on which distillery stood, and before that viz; May 23, 1871 for value, mortgaged said lots to John Dempsey, to secure a bona fide debt, viz; $2681,00 mortgage duly recorded. Mortgage was entirely unknown to them, and the officers of

Plaintiff did not require, nor did Hosmer then file with the assessor of the district, the written consent of said Dempsey, that the United States should have the first lien, over his mortgage.

That no bond of indemnity against said mortgage was filed, and assessor approved said bond without such consent being filed. Collector siezed and sold said premises for taxes, subject to said mortgage—that if the United States had had the first lien required by law, premises would have satisfied the tax.

3 That all the taxes charged and sued for, were assessed against Hosmer on spirits distilled by him at said distillery, and were first and paramount lien on all said spirits, and the spirits were deposited in bonded warehouse of Plaintiff under the control of plaintiff and its officers. Yet the Collector permitted Hosmer to remove them contrary to law, without paying tax, and there was of the spirits, more than enough in value to have paid all said taxes—and all this without knowledge, or consent of these defendants.

Plaintiff demurred generally to second and third defenses.

This demurrer was sustained as to each.

Defendant excepted and filed motion for new trial and rehearing.

The Statutory provisions are the act of July 20, 1868 15, Stat. 125.

Tax is first lien on spirits and distillery. § 1.

Bond not to be accepted, nor approved unless property clear or preference given, &c. §§, 8, 17.

Tax on spirits, §§, 1, 13, 53.

Storekeeper has charge, § 21.

Spirits only to be withdrawn on payment of tax, §§ 15, 24, 25.

No special tax assessed until &c. § 11.

Leaseholders bond, § 8.

Leaseholders amended Act Apr. 10, 1869. 16 Stat. 41.

Duty to collect tax monthly, 13 Stat. 224, 232. Sec. 28, p. 232. 13 Stat. 469, 70.

As to second defense in the answer, it is claimed the facts set up show there was no legal bond signed.

The assessor had no power, no authority, to approve the bond. 15 U. S. Stat. at large, 128 Sec. 7. Act July 20, 1868 Sec. 8.

The language of the Statute is absolute: peremptory.

There was simply a conditional execution of it, by sureties.

They had the right to, and did contract with reference to revenue laws, and regulations then in force.

One of these was that the bond could not become operative until all liens, and encumbrances upon the distillery property should be released or postponed to the lien for taxes. 9 Wheat, 720 also Ib. p 734, near top.

Lovell vs. Adams, 3 Wend. 380.

United States vs. LeBaron, 19 How. 77.

Ligget vs. Humphrey, 21 How. 76 near bottom.

The release of the distillery property from prior incumbrances was imperative, and a condition precedent to any right to approve, 3 Wend. 380.

When Statute prescribes terms of the condition of a bond its provisions must be strictly complied with or bond void, Barnard vs. Viele, 21 Wend. 88, 21 Wall. 656.

It amounts to a fraud on the sureties, if the assessor approves the bond while the property is encumbered.

This bond never had any life. It never took effect. It did not take effect at signing, It only takes effect when approved by authority of, and according to law, U. S. vs. LeBaron, 19 How. 73, Sec. 7. act, July 20, 1868. 15 Stat. 127

The bond is especially a statutory bond. It gets its entire existence from and by virtue of the statute. Only then by a strict, literal compliance with the provisions of the statute, does it become obligatory.

This case arose before Osborn vs. U. S. 19 Wall. 577. was reported.

I ask the Court, however, to review the question.

Why did law require bond of indemnity if premises encumbered?

It is said in 19 Wallace, that assessor is under no obligation to sureties. But he is under great obligation to perform truly and honestly his duty. The surety cannot control him. The surety signs a bond with a plain statute saying it *shall* not be approved unless &c.

The bond is, until approved only an escrow.

It can only be legally approved when certain facts and conditions exist.

An illegal, unauthorized approval is a nullity.

If this be not so, of what effect, or avail, is the statutory prohibition? What is it for?

It does seem to me that the effect of denying our claim, is to annul these very plain, emphatic statutory requirements.

I think 21 Wall. 656, sustains this view, and is not in harmony with 19 Wallace. Certainly it is opposed to cases above cited from 19 How. 77. and 21 How. 76.

 security

As to third ground of defense, it is claimed the Government had a lien on the 6,000 gallons of Spirits. It had the custody of the spirits. Its officers were forbidden to release them until tax paid. This amounts to a collateral; and by releasing it the sureties were discharged *pro tanto*.

2 Am. Leading Cases 258 &c. fully, and the cases cited.

"When real or personal securities, or effects have been "pledged, or given to creditor by principal, they must "form a part of the elements of safety, or indemnity, to "which the surety may have looked in consenting to be "bound for the debt. Ib page 258.

And it is not necessary that it form an inducement to contract. Ib pages 259, 260, 261.

Baker vs Briggs, 8, Pick. 122.

Coen vs Miller, 8, S. &. R. 452, and see 2. Am. Leading Cases, 259, 263.

The Collector was bound to preserve this security unimpaired. Ligget vs Humphreys, 21 Howard 75.

If the obligation of the surety is regarded as a continuing guaranty, then from the facts alleged, (and they are found to be true) there was such fraud, in law, in the conduct of the Government officers, as will work discharge of the sureties. Phillips vs Foxhall 3. Eng. R. 259.

S. C. Law, Reps. 7, Q. B. 666.

The officers of Government must have known that Hosmer was not paying his tax. They had then abundant security. The sureties had the right to assume that these officers knowing this, would not only secure payment of tax, by holding the liquor for it, but would see that no further tax accrued, that the debt was not increased. By neglecting these steps so obviously dictated by justice and equity, surety discharged, See Ib 265, 266. Per Quain J.

If creditors does any act injurious to the surety or inconsistant with his rights, surety discharged. 1 Story Eq. Jur. § 325, 326.

The creditor can do nothing to invalidate the security he has taken from principal debtor, nor to discharge it. Hayes vs. Ward 4 John, Ch. 129.

Rees vs. Bennington, 2 Ves. Jr. 540, and notes.

When debt secured by pledge, and the principal surrenders the pledge, surety so far discharged. Baker vs. Briggs, 8 Pick. 122, 129.

And the United States and its agents &c. were bound to use

diligence in the care and keeping of this collateral security-See cases cited. See 14 Ohio St. 1, 21 Howard 75.

It must be borne in mind that the sureties on this bond, had no control over this collateral security, the spirits, hence greater diligence required of the Government and its officers.

But it is said these defenses simply set up *laches* on the part of the Government officers, and therefore constitute no sufficient defense, and U. S. vs. Kirkpatrick, 9 Wheat, 720. U. S. vs. Vanzandt, 11 Wheat, 184. Dox vs. P. M. General, 1. Peters 318, are relied upon.

These cases establish no new principle; nor a principle peculiar to the United States. See 9 Wheat, 736.

The principle is that *mere laches* will not discharge surety That *laches does not of itself* discharge surety on official bond.

The cases are those of mere delay. In none of them was a collateral security relinquished.

In the case from 9 Wheat, a mere neglect to enforce a periodical accounting by collector of taxes, did not discharge surety.

In 11 Wheat, it was held that mere delay or neglect to require periodical settlements of a paymaster, did not discharge surety.

In 1 Peters it was held that mere delay to commence suit within six months, against a defaulting or delinquent Post Master, did not discharge surety.

In none of these cases did any question arise as to effect of releasing collateral security. But all these cases recognize the law affecting principal and surety, as just as applicable to the United States as to a private person. See 9 Wheat, 736, see 6 Howard, 279, where it is said that giving time to principal on Post Master's bond would undoubtedly discharge surety. See also U. S. vs, Davis, 3 McLean 483, where it was held, surety may plead principal discharge in bankruptcy, under act 1841.

When by act of the creditor, any collateral security which he holds, or which is under his control is lost, or destroyed, the surety is discharged. Wolff et al. vs. Jay, 3 English R. 298, S. C. Law Reports 7 Q. B. 756.

So, if by any act creditor incapacitate himself from subrogating the surety to his right. Chester vs. Bank, 16 New York 336.

Now most assuredly the right of defendants here to subrogation has been deprived them.

And it is abundantly settled that the discharge or release of one surety by United States on bond to Government, will discharge co-surety.

We concede, in the precise terms of the cases cited by the district attorney below, that *mere laches* on the part of the officers of the Government will not discharge surety.

It is only conceding a doctrine long settled. But laches proper is entirely distinct from the act of releasing property held as security.

Releasing a levy, failing to register a mortgage whereby the lien is lost, neglecting to renew a chattle mortgage, refusing or neglecting to insure, these it has been repeatedly held discharged surety. See Wolff vs. Jay, 3 Eng. Reps. 298, 302. S. C. Law Reports 7 Q. B. 756.

Simple delay to sue principal does not discharge surety, *but any act, or failure to act* by which a collateral security is lost, does discharge surety. It is the business "of the principal to do whatever is necessary to make that security properly available". Ib. per Cockburn C. J. p 304, also 1. Story Eq. §. 326. Low vs. E. India Co. 4 Ves, 833, Roberts vs. Thompson et al, 14 O. S. 1, 7. See Lawrence vs. McCalmont 2 How. 454 top. 3 Leading cases in Eq. (* 832) 543, 3rd Am. Ed.

The language in the last authority is, "as a surety is on "payment of the debt, entitled to all the securities in the "hands of the creditor, *whether he is aware of their ex-* "*istence or not*, (ante vol. 1, pp 86, 87,) if the creditor "who has or *ought* to have them in his full possession or "power, loses them, *or permits them to get into the* "*hands of the debtor*," the surety will to the extent of such security be discharged.

To this proposition numerous cases are cited. See Mayhew vs. Crickett, 2 Swanst, (191) Scott vs. Knox, 2 Jones 778.

The creditor is not entitled to relinquish any hold which he has actually on the property or estate of the principal. 3 Lead cases, in Eq. 552 top paging 3 Ed. Citing many cases and full on this subject. And it is clear from these, that it makes no difference *when* the security was received. See 3 English R. 305 per Hannen J.

The error consists in assuming that the acts and conduct charged on the Government officers, in our answer, constitute *laches* and *no more*.

We charge much more than mere delay to sue, more than mere delay to collect tax. We charge the *release*, and *giv-*

ing up of valuable securities, the surrender of the means and property from which the taxes ought to have been made. This is entirely distinct from laches. See fully on this, Dye vs. Dye, 21, O. St 86, 92, 97, especially page 93, full and able statement of the law. 2 Story Eq: Jur. sec 1520 last clause.

No case can be found which establishes or tends to establish the doctrine that any different rules or principles obtain as between the State or United States and surety, and an individual and surety.

The cases establish the law that no different rule obtains. See the cases cited. Also Hunt vs. U. S. 1 Gallison 32. where Story. J. recognizes doctrine (in case where U. S. a party) that discharge of one debtor taken on execution, or if one arrested and discharged on agreement to pay at future day, the other surety is discharged. Also U. S. vs. Howell 4 Wash. R 620, 623, very express on this. "If the creditor, "*whether the United States or an individual* give time "* * surety discharged."

And I call attention to the following additional cases, as bearing generally upon the points made, and especially as demonstrating that sureties on bonds to United States are subjected to no peculiar rules, no different principles other than usually governing the relation of principal and surety.

The obligation of the surety is *strictissimi juris*, 21 How. 67, 75, Leggitt vs. Humphreys, citing 3 Kent's Com. 124 U. S. vs. White 1 Wash. cir ct. R. 417. U. S. vs. Boyd 15 Pet. 187.

15 Pet. 187, 208-9, U. S. vs. Boyd Intext on p 208-9. Cotron, J. says "It is insisted on behalf of U. S. that * * sureties are bound equally w th principal etc. but this court held in Miller vs. Stuart, that the liability of a surety is not to be extended by implication. That his undertaking is to receive a strict interpretation.

1 Black 140, 148-9, Bryan vs. U. S. held surety on officers (surveyor Gen'ls) bond not liable for money transfered to an agent of the officer, by the Government &c.

1 Peters 573, U. S. vs. Stansbury, 7 Curt. Cond. 704 S. C. where discharge by Sec. Treas. of principal debtor taken on a *Ca Sa* pursuant to act of June 6 '98 does not discharge surety, because the law expressly authorizes it. No intimation of any rule peculiar to U. S. but it is said p 576 "If creditor had "entered into compromise not prescribed by law, or had "given any discharge not directed by statute, the question "might have been open for argument." Marshal l C. J.

5 Pet. 173, Hunter vs. U. S. (9 Curt. Cond. 271, S. C.) Surety pays debt to U. S. subrogated to rights of U. S.

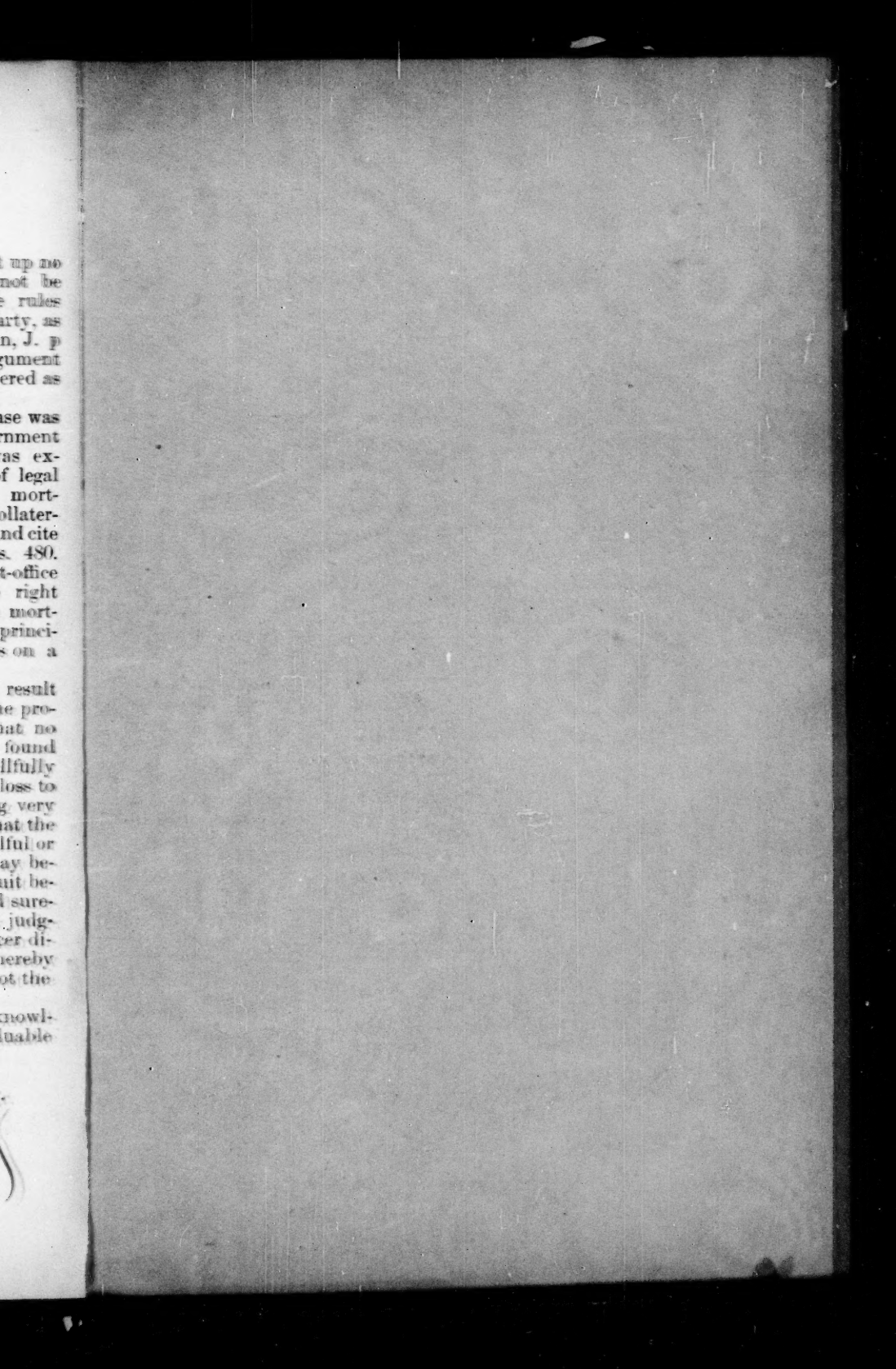
right of priority etc ;—Syllabus,—United States can set up n
right under (a voluntary) assignment, which might not b
claimed by any other creditor p 182. "That the same rule
"of contract are applicable when the sovereign is a party, a
"between individuals is admitted &c." Per McLean, J.
185, and again p 186, "The authorities read in argumen
"going to show a release of sureties &c., are not considered a
"opposed to the doctrines here laid down" p 186,

6 How. 279 U. S. vs. Hodge, (16 Curt. Cond. 681,) Case wa
against sureties on post-masters bond, plea, that Governmen
had taken mortgage from principle by which time was ex
tended, but Sup. Ct. held that there was no suspension of lega
remedy on the bond, as there was no provision in the mort
gage to that effect &c., and said it was merely taking collater
al security, and say holder of a bill might do as much, and cit
1 John's Cas. 131, 3 McCord 13, 12 Mass. 502, 8 Mass. 48
But court says, McLean J. page 282 " now if the post-offic
"department had by the mortgage suspended the righ
"of action on the bond, for the time limited in the mort
"gage, it might have released the sureties" * * "The princi
"pal is in no respect different from that which arises on a
promissory note * *" p 283

But suppose it be claimed, which is the only logical resul
of the argument for the U. S. that the sureties are for the pro
tection of the government, *in any event* I answer that no
adjudged case, at least no authoritative case can be found
which goes so far. If the collector or assessor either willfully
or negligently do or suffer any thing which causes a loss to
the U. S., then such officer is liable. It would be going very
far, and establish a rather startling precedent, to say that the
surety on the distillers bond shall be liable for the willful or
negligent conduct of such officer. If so, the surety may be
come the victim of the assessor or collector. Suppose suit be
gun on distillers bond, judgment against principal and sure
ties, levy on property of principal, sufficient to satisfy judg
ment, and then U. S. attorney, collector or other officer di
rects a release of the levy without consent of surety, whereby
the property is put beyond reach of officers, could not the
sureties set this up as a defense pro tanto?

Or suppose such judgment, and Dist. Att'y. without knowl
edge of sureties gives principal 90 days time for a valuable
consideration, are not the sureties discharged?

JOHN M. LEMMON,
Counsel for Plff. in Error.



In the Supreme Court of the United States.

OCTOBER TERM, 1877.

GOTTLIEB HART ET AL., PLAINTIFFS IN ERROR,
vs.
THE UNITED STATES.
No. 98.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

Brief for the United States.

In the Supreme Court of the United States.

OCTOBER TERM, 1877.

GOTTLIEB HART ET AL., PLAINTIFFS IN ERROR, vs. THE UNITED STATES. } No. 98.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO

BRIEF FOR THE UNITED STATES.

STATEMENT.

Suit by the United States upon a distiller's bond given by one Hosmer, with said Hart & Stahl as his sureties, conditioned for a faithful compliance by said Hosmer with all the provisions of law relating to the distilling business and for the payment of all penalties and fines imposed upon him for any violation of any of such provisions, and that he "shall not suffer the tract of land on which the distillery now stands, or any part thereof, to be encumbered by mortgage, judgment, or other lien during the time in which he shall carry on said business." (Record, 5, bottom.) The breach alleged was the distillation of a large quantity (6,000 gallons) of spirits on which Hosmer was bound to pay the tax of half a dollar a gallon, ($3,000,) but which tax he never has paid, though demanded. (Record, 6, top.) Hart & Stahl's only connection with the matter was as sureties upon Hosmer's bond, which was signed by the parties

May 29, 1871, handed by Hosmer to the deputy assessor June 1, 1871, for transmittal to the assessor, who received and approved it June 5, 1871, and then sent it to the collector, whom it reached by due course of mail. (Record, 10, bottom.) For defense, the defendants set up that the assessor had no authority to approve nor the collector to receive said bond; but this was struck out by order of court and the defendants excepted. (Record, 8, bottom; 10, folio 20.) They also pleaded that Hosmer had mortgaged his distillery without their knowledge May 23, 1871, six days earlier than the date and execution of this bond, to one John Dempsey, which mortgage was duly recorded May 25, 1871; but they did not aver that the assessor or collector had any knowledge of it; also averring, however, that Dempsey never filed with the assessor his consent to the use of the premises for distilling purposes, nor stipulated that the lien of the Government should have priority over this mortgage, nor that the title should vest in the United States, in case of forfeiture, discharged of the mortgage; nor did Hosmer give bond to indemnify against said mortgage conformably to the act of April 10, 1869, c. 18, (16 Stats., 41, 42,) but the bond in suit was taken and approved without such stipulation or indemnifying bond. The defendants further pleaded that, by reason of Hosmer's failure to pay certain taxes on distilled spirits, which were chargeable and a lien upon the premises, part of said premises were distrained upon and sold for $6,100 and the mortgage aforesaid paid out of the proceeds of sale, which, but for the mortgage, would have paid all Hosmer's indebtedness to the United States for such taxes. (Record, 6, 7.)

Their third plea was that the unpaid taxes, the nonpayment whereof was assigned as the breach of this

bond, were a first and paramount lien upon said spirits; but that the collector of internal revenue for the district allowed said Hosmer to remove from the bonded warehouse, in which they were deposited, and to dispose of and convert to his own use, without paying the taxes thereon, a large quantity of said spirits, more than enough to pay all the plaintiffs' claim against said Hosmer, without the knowledge or consent of the sureties. (Record, 7, 8.)

The United States attorney demurred to these pleas, which the court found insufficient in law, though true in fact, and therefore sustained the demurrer, (Record, 10,) and gave judgment for the plaintiffs for $3,048.40. (Record, 11, top.) The defendants excepted. (*Ib.*)

BRIEF.

I.

As to the first plea, the court find a delivery of the bond, and the sum due thereon, as matters of fact, and that its statement of lack of authority on the part of the officers to approve and receive the same, as ill-founded in law. It is so well established that the Government could recover upon the bond without any approval of it by the assessor at all, that extended discussion of this objection is unnecessary. Legal provisions made by the Government for its own security form no part of the contract with the sureties; and this, as to approval, is one of these provisions. People *v.* Johr, 22 Mich., 461, per Christiancy, J., referring to United States *v.* Kirkpatrick, 9 Wheat., 720; United States *v.* Van Zandt, 11 Wheat., 184; United States Bank *v.* Dandridge, 12 Wheat., 81, etc.; United States *v.* Nicholl, *Id.*, 509; People *v.* Russell, 4 Wend., 570; Williams *v.* Coleman, 49 Mo., 325; Bonta *v.* Mercer Co., 7 Bush., 576; United States *v.* Maurice, 2 Brock., 96; United States *v.* Jinzey, 5 Peters, 115.

The reports of those States which (like Maine) authorize the release of a poor debtor from arrest upon giving a bond approved by two justices of the peace, are full of decisions that bonds not executed or approved in conformity with the statute are good at common law.

II.

The same cases answer so much of the second plea which sets up the fact that the premises were mortgaged prior to and at the date of the execution and acceptance of the bond. The requirement that there should be no incumbrance upon the property prior to the lien for the excise, was also merely a provision for the better security of the United States. If the record thereof was notice to the officers of the existence of the mortgage, it was equally so to the sureties; and there is no other proof of any knowledge of it on the part of either. Therefore all stand in the same position, and the sureties cannot impute wrong or laches to the Government in this respect. (Dox *v.* Postmaster-General, 1 Peters, 325; United States *v.* Boyd, 15 Peters, 208; Jones *v.* United States, 18 Wall., 663.)

III.

1. The third plea, stating the neglect of the officer to exact the taxes before the liquors were removed from the bonded warehouse, or his permitting their removal before the taxes were paid, was a case of mere laches, for which the Government cannot be held responsible. (See cases *ante*.) The distiller was bound, as well as the collector, to know and observe the law. If the removal was in accordance with law, and was the right of the distiller, nobody can complain of it. If it was illegal, then that very act was a breach of this bond. Even if directly assented to by the collector, instead of being carelessly

permitted, the sureties cannot set up the misconduct of this officer (even if it amounted to that) against the people or the Government who are interested in this bond. (United States *v.* Simpson, 3 Penn., 437; Mensdorff *v.* Singer, 5 Watts, 179; Farmers' Bank *v.* Reynolds, 13 Ohio, 84.) It does not run to the collector, but to the United States of America. (Bonta *v.* Mercer County, 7 Bush., 576.)

2. The plea, as it stands on demurrer, does not show that the sureties were damnified. Suppose liquors worth over $3,000 were removed without payment of the tax, it does not appear but that a much larger amount was left in the warehouse. If so, the United States could not be compelled to resort to its lien instead of suing this bond. (Adams Bank *v.* Anthony, 18 Pick., 238; Taft *v.* Gifford, 13 Metc., 187.) Lewis v. U.S., 92 U.S., 623, bottom.

Again, the act of June 6, 1872, (17 Stats., 242,) expressly authorized such removal, in certain cases, without prepayment of tax, although previous legislation had forbidden any removal before the taxes were paid, (15 Stats., 131, top,) under penalty of fine and imprisonment, to be inflicted upon any person conniving at the removal. (See act of July 20, 1868, c. 186.)

The petition was filed July 27, 1872, and the plea November 12, 1872. This court will presume that the citizen and the officer both obeyed the law, and that the removal took place *after* June 6, 1872. It will also so presume, because it is incumbent upon the plaintiff in error to make any error in the court below plainly apparent before he entitles himself to relief. (Lahey *v.* Heenan, 81 Penn. St., 185, 189, and authorities generally.)

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Possession is not essential to statutory lien. Beall v. White, 94 U.S., 382.

It can hardly be contended that the United States is responsible to the sureties upon a bond to it if any general legislation, of a public character, incidentally operates to their prejudice. (Supervisors *v.* Otis, 62 N. Y., 88.)

EDWIN B. SMITH,
Assistant Attorney-General.